84-62

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ATLAS MACHINE & IRON WORKS, INC.,
Petitioner,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether a governmental entity such as the Tennessee Valley Authority may terminate contracts for default after earlier electing without reservation to waive the contractor's breach, and to allow continued performance for two years.

(2) Whether an injured party's reasons for electing to continue performance after a contract breach are relevant to the issue of whether a waiver of the right to terminate has occurred.

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OPINIONS BELOW

The opinions of the Fourth Circuit Court of Appeals (App. A, *infra*, 1a - 9a) and the District Court for the Eastern District of Virginia (App. B, *infra*, 10a - 20a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1984. A timely petition for rehearing was denied on June 1, 1984, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1982).

STATEMENT OF THE CASE

1. In 1978, the Tennessee Valley Authority (TVA) awarded Atlas Machine & Iron Works, Inc. (Atlas)[1] two competitively bid government contracts calling for Atlas to fabricate and deliver to TVA certain heavy steel components for six nuclear power plants that TVA was constructing in Hartsville and Phipps Bend, Tennessee. From the beginning, the project was plagued by TVA's defective specifications, arbitrary in-plant inspectors, numerous design changes, constant adjustments of work priorities, as well as the disruption in the nuclear power industry following the Three Mile Island accident in March, 1979. As a result of these and other problems, Atlas was unable to meet the delivery dates specified for the two contracts, and never able to deliver all of the required items.[2]

2. Atlas first breached the initial contract by missing the March 1, 1979 delivery date on the firs unit. The second contract was breached when the initial delivery date of April 17, 1979 was not met. Instead of terminating the contracts after these initial breaches, TVA elected to continue with the project and to work with Atlas in solving the design and welding problems. At no time did TVA expressly reserve its right to terminate for breach. It permitted Atlas to continue under the contracts, and to incur great expenses in attempting to perform as re-

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[1] Atlas is a steel fabricating firm located in northern Virginia. It is owned partially by Williams Enterprises, Inc., also a Virginia corporation.

[2] Although the district court found, and the court of appeals affirmed, that both parties contributed to Atlas' inability to perform, the Court may assume for purposes of this Petition that Atlas breached the contracts by failing to deliver on schedule. Causation of Atlas' problems is irrelevant to the waiver issue presented in this case.

quired. After nearly two years in a largely futile effort to resolve the monumental problems, TVA terminated the two contracts for default in February, 1981. A year later, TVA's entire nuclear power project was scrapped as a result of dramatic reductions in anticipated load growth, and increased construction costs which plagued the nuclear power industry in the wake of the Three Mile Island accident.

3. At trial,[3] the district court ruled that TVA had furnished defective specifications to Atlas, and the court granted Atlas the right to recover its costs in attempting to build the components to the required tolerances. The court found that TVA "elected" to continue the contracts instead of terminating them after Atlas first missed delivery dates in 1979. It noted that TVA waited approximately two years after default before terminating. Despite this finding of election, the court denied Atlas' argument that TVA had waived its right to terminate for default. It characterized the two-year delay as TVA's "forbearance period" and concluded that the termination for default in 1981 was justified. (App. B, *infra*, 15a - 16a).

4. On appeal, the Fourth Circuit affirmed the district court's decision on the waiver issue. (App. A, *infra*, 5a). It dealt with this issue in one short paragraph, stating:

> . . . [W]e refuse to conclude that the basic principles of contract law are so inflexible so as to require so stringent a result despite the complexity of the contracts at issue. The district court found that, had "TVA immediately terminated Atlas' contracts upon its failure to timely deliver the first frames, both would have been the loser: Atlas, financial—TVA,

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[3] Jurisdiction for Atlas' claims in the district court was based on the Contract Disputes Act of 1978 §§ 3, 10, 41 U.S.C. §§ 602, 609 (1982), and 28 U.S.C. § 1337 (1982).

> timewise." For the reasons discussed above, the finding was not clearly erroneous, and leads to the conclusion that TVA's reasonable efforts to salvage the situation cannot be viewed as a waiver of its rights to claim default.

(*Id.*). The above statement indicates that the appellate court, like the district court, did not distinguish between TVA's reasons for continuing the contracts, and the issue of whether a waiver of the right to terminate had occurred. Both courts ruled that TVA was justified in its delay, and that its reasons for having Atlas continue the contracts were relevant to the issue of waiver. Atlas contested this ruling by petitioning the Fourth Circuit for rehearing on the issue. That petition was denied. (App. A, *infra*, 8a - 9a).

REASONS FOR GRANTING THE PETITION

The Court of Appeals Ruling that No Waiver Had Occurred Is In Conflict With the Law Applied In Other Circuits.

The holding of the district court and the court of appeals in this case is unique to American law and in conflict with the decisions of other circuits, in particular the Court of Claims.[4] No court in any circuit has ever

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[4] The former appellate division of the Court of Claims is now the United States Court of Appeals for the Federal Circuit. *See* The Federal Courts Improvement Act §§ 101, 102, 127, 28 U.S.C. §§ 41, 44, 1295 (1982).

The holding of the lower courts in this case is in direct conflict with at least eight Court of Claims decisions. *Cities Service Helex, Inc.* v. *United States*, 543 F.2d 1306, 1313-14 (Ct. Cl. 1976); *International Telephone & Telegraph Corp.* v. *United States*, 509 F.2d 541 (Ct. Cl. 1975); *Airco, Inc.* v. *United States*, 504 F.2d 1133 (Ct. Cl. 1974); *Ling-Temco-Vought, Inc.* v. *United States*, 475 F.2d 630, 636-39 (Ct. Cl. 1973); *DeVito* v. *United States*, 413 F.2d 1147 (Ct. Cl. 1969); *Bailey Specialized Buildings, Inc.* v. *United States*, 404 F.2d 355

found a default termination justified after a two-year delay and long continued performance, unless the injured party had expressly reserved its right to terminate at the time of the initial breach. Clearly, a governmental entity like TVA requires a period of time after a contractor's breach to determine whether to terminate or to waive the default. This "forbearance period" ordinarily is considered by the courts and boards of contract appeals to last for 30 days.[5] This period may be shortened or lengthened to accommodate unique circumstances.[6] However, never has this "forbearance period" come close to approaching the two years found by the lower courts in the present case. Indeed, the Court of Claims noted that the *48-day* delay in *DeVito*, *supra*, n.4, constituted "extreme circumstances" in which it was "hardly surprising that a waiver was held to have occurred." *Switlik Parachute Co.* v. *United States*, 573 F.2d 1228, 1234 (Ct. Cl. 1978). Under all relevant precedent, the two-year delay by TVA in terminating Atlas' contracts was unreasonable and cannot properly be characterized as a "forbearance period." The lower courts' approval of a two-year delay between the breach and the cancellation was a gross misapplication of the law.

(Ct. Cl. 1968); *Acme Process Equipment Co.* v. *United States*, 347 F.2d 509 (Ct. Cl. 1965), *rev'd on other grounds*, 385 U.S. 138 (1966); *Companhia Atlantica* v. *United States*, 180 F. Supp. 342, 347 (Ct. Cl.), *cert. denied*, 364 U.S. 862 (1960).

[5] *See* the administrative board decisions in *Sidney G. Kornegay*, ASBCA No. 18454, 76-1 BCA ¶ 11,744; *Menches Tool & Die, Inc.*, ASBCA No. 19255, 74-2 BCA ¶ 10,969; *Maurey Instrument Corp.*, ASBCA Nos. 11644, 12065, 67-2 BCA ¶ 6480.

[6] *See H.N. Bailey & Associates* v. *United States*, 449 F.2d 287 (Ct. Cl. 1971); *Amecom Div., Litton Systems, Inc.*, ASBCA No. 19687, 77-1 BCA ¶ 12,329, *aff'd* 77-2 BCA ¶ 12,554; *Crawford Dev. and Mfg. Co.*, ASBCA No. 17565, 74-2 BCA ¶ 10,660; *Heat Exchangers, Inc.*, ASBCA No. 9349, 1964 BCA ¶ 4381.

The lower courts also contradicted existing circuit court precedent in basing their decisions on TVA's reasons for electing to continue performance. There is almost no discussion in waiver cases of the *reasons* why an injured party chose to continue performance without immediately asserting its right to terminate. When such discussion has occurred, it was only in regard to a seller's remedies under the U.C.C., and the issue arose only where there had been an *express reservation* of the right to terminate, a situation which is doubly distinguishable from the present case. In most cases involving waiver, the reasons for continuing performance are not even discussed and are irrelevant. Indeed, cases which find waiver to have occurred despite seemingly valid reasons for delay clearly establish that such reasons are irrelevant to the analysis and should not be considered when deciding the waiver issue. In light of this, the decision by the lower courts in this case was clearly erroneous and should be reversed.

A. Basis of Waiver Doctrine

The courts have demonstrated their confusion in merely defining the waiver doctrine, much less in applying it. Williston has recognized this confusion and cites as many as nine different definitions of the term. 5 S. Williston, *A Treatise on the Law of Contracts* § 679 (3rd ed. 1961). Essentially, however, the courts have adopted the waiver doctrine out of concern for the effect of the injured party's acts on the behavior of the breaching party. There is considerable emphasis in the cases on the harm caused to a contractor who continues performance, incurs costs, and relies on the injured party's silence and continuation. The law is concerned with minimizing losses to individuals and society, and the doctrine of waiver is designed with such a purpose in mind. Accordingly, a party's motives in continuing performance are irrelevant to

the issue. The courts are concerned not with the aims and reasons for the actions of the injured party, but with their *effects* on the breaching party. The *effects* on a breaching party of a decision by the non-breaching party to continue performance are the same regardless of the reasons for that decision. In order to make economically rational decisions, the breaching party needs to know the intentions of the party who possesses the right to terminate. For this reason, the rule of express reservation of right developed to provide the breaching party with an element to consider in deciding whether to continue with the contract, or terminate then and there, saving needless expense. A rule of law that does not require such a reservation, but permits a party to invoke an old breach at a later date runs counter to the law's concern with efficiency and mitigation of damages. The very harm the courts have been concerned with in adopting the waiver doctrine—increased expenses and losses by breaching parties—is allowed to occur. The law's aims are frustrated, and society as a whole is the loser.

The principle established by the lower courts in this case departs radically from previous decisions. It wholly defeats the attempt of the waiver doctrine to maintain economic efficiency and protect breaching parties from inconsistent actions of injured parties who first ignore and then seek to assert their rights. It breeds confusion instead of clarity, and inefficiency instead of economy. This aberration in the law of waiver should be corrected and the conflict among the circuits reconciled.

B. Relevant Case Law

As mentioned above, there is little discussion in federal case law of a party's reasons for continuing performance and their relevancy to the question of waiver. The courts' silence on the matter is persuasive that such reasons are

irrelevant and not worth discussing. Furthermore, an analysis of the facts and holdings of these cases shows that such reasons are not and should not be considered in analyzing the problem.

One case which supports the proposition that a party's reasons for continued performance are irrelevant to the waiver question is *DeVito* v. *United States*, 413 F.2d 1147 (Ct. Cl. 1969). This was a contractor's suit seeking to recover for the Government's default termination of a fixed-price supply contract. The Court of Claims found that the Government's conduct constituted a waiver of the right to terminate for breach. The Government delayed termination for 48 days after the contractor's default in delivery, and during that period, accepted deliveries from the contractor, and was aware of the contractor's efforts to catch up. *Id.*

The court in *DeVito* mentioned in passing that the 48-day delay was due to the contracting officer awaiting authorization to terminate from his superiors. While this appears to be a justifiable reason for the Government not to have terminated earlier, the court did not even consider it. The strong implication is that such justifications are irrelevant to the question of whether waiver has occurred.

The *DeVito* court's position on the matter is reinforced when it sets forth the elements of waiver:

> The necessary elements of an election by the nondefaulting party to waive default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent.

413 F.2d at 1154. The court's silence on the reasons for continuation indicates how it views the question. The lack of such reasons simply is not an element of the waiver doctrine. Nowhere does the court mention that waiver occurs only if the injured party has no valid reason to continue, or that should a valid reason exist, it would be dispositive of the waiver question. Such reasons are simply irrelevant.

Another relevant case from the Court of Claims is *Ling-Temco-Vought, Inc.* v. *United States*, 475 F.2d 630 (Ct. Cl. 1973). LTV had contracted with the Navy to supply it with large screen display systems for plotting data received from radar. LTV became aware of the Government's misrepresentations concerning such systems, but continued performing the contract after this breach without reserving its right to terminate. The Court of Claims found that LTV waived this right. Its failure to expressly reserve it proved fatal to its claim. *Id.*

In the course of the opinion, the court emphasized the effect of LTV's conduct on the Government:

> [W]e think that plaintiff does not meet the general standard which the law has been developing for a non-defaulting party, aware of a material breach, who desires to maintain the contract alive and functioning. . . . [T]he basic principle [calls] for fair treatment of *both* parties—weighing the advantages to the injured side of continuing performance (with or without reservation of rights) against the disadvantages to the defaulter, and *requiring that due opportunity be given the latter to make use of the options then lawfully available to him.* However the legal conclusion be framed, in terms of "waiver" or "election" or "estoppel," that is the core concept. (Emphasis added).

475 F.2d at 638. The court here is concerned with the effect of continued performance on the breaching party's actions. This is emphasized by language later in the opinion:

> The short of it is that, whatever its intentions, plaintiff did not act reasonably and fairly toward the Government when it continued performance after early September, without giving any indication of its misrepresentation claim.

Id. at 639. That the court was so concerned with the effect of continued performance on the breaching party's behavior demonstrates that the reasons for so continuing are irrelevant to the analysis. *Justified or not, the effect of continued performance is the same on the breaching party.*

In *Acme Process Equipment Co.* v. *United States*, 347 F.2d 509 (Ct. Cl. 1965), *rev'd on other grounds*, 385 U.S. 138 (1966), the court held that the Government's delay of over a year in cancelling a contract amounted to a waiver of its right to terminate. The court found, "The sanction of contract cancellation is too drastic to permit long delay," 347 F.2d at 516. The court put strong emphasis on the harm such delay causes the contractor who continues to incur costs unaware of the Government's intention to cancel. Again, no mention is made of the reasons for the delay in this case or of the possibility that such delay may be justified. The court's concern with the harm suffered by the contractor indicates that the reasons for continuation should not be considered in the decision.

Only one federal case even discusses an injured party's reasons for continuing performance. *Northern Helex Co.* v. *United States*, 455 F.2d 546 (Ct. Cl. 1972). This case involved a long-term contract between Northern Helex and the Interior Department in which the contractor

agreed to supply the Government with helium gas for twenty-two years for the purpose of conserving this depleted natural resource. The contract was authorized by the Helium Act Amendments of 1960 (50 U.S.C. § 167, *et seq.*), and entered into in 1961.

Helium is a by-product of natural gas production, and the two commodities are so interrelated that they could not be separated by Northern Helex. If the helium gas was not captured and sold, it would be wasted by escaping into the atmosphere. The contract provided that the helium would be extracted by Northern Helex as a result of this process, and the Government was aware of the elements' interrelation. *Northern Helex*, 455 F.2d at 548.

For a variety of reasons, the financing for the helium contract proved unavailing, and beginning in December 1968, the Government was in default on its payments. Negotiations undertaken to modify the contract proved futile. In December 1970, Northern Helex filed suit for breach.

From the date of initial default, and even after suit was brought, Northern Helex continued to deliver helium to the Government. It maintained that it continued the deliveries in order to mitigate damages and because of the integration of its facilities and the need to save helium. Unlike TVA in Atlas' case, however, *Northern Helex was careful to reserve its rights to terminate for default.* 455 F.2d at 549.

At trial, the Court of Claims rejected the Government's argument that Northern Helex had waived its rights to sue on the breach by their continued deliveries under the contract. The court found that it was commercially reasonable for them to continue deliveries of the gas because of its integration with their natural gas produc-

tion, and it also found that in maintaining the deliveries, Northern Helex favored the public policy of conserving a natural resource. The court said, "These are good reasons vindicating plaintiff's decision to continue performance." 455 F.2d at 551. The court further stated that, "We accept . . . as valid the reasons plaintiff gives for continuing performance despite the Government's material breach." *Id.* at 552.

In so holding, the Court of Claims gave an indication that reasons for continuing were, in this case, relevant to the waiver issue:

> It is plain . . . that, to determine whether waiver has occurred, a more complex inquiry must be made than merely, "did performance continue?" The guiding principle is whether, in the individual circumstances, the seller exercised "reasonable commercial judgment" in continuing to manufacture and deliver, in the effort to mitigate damages, although his obligation to perform had been discharged by the buyer's total breach.

455 F.2d at 553. The court here referred to the Uniform Commercial Code provisions allowing wronged sellers "in the exercise of reasonable commercial judgment" to complete unfinished and unidentified goods, identify them to the contract and sell them for resale in order to mitigate losses. U.C.C. §§ 2-703, 2-704 (1977). In addition, the comment to 2-703 "rejects any doctrine of election of remedy as a fundamental policy." U.C.C. § 2-703, comment 1 (1977). The court relies on both of these sections to support its position that the reasonableness of the decision to continue is important in determining whether or not a waiver occurred. *Northern Helex*, 455 F.2d at 553. The court also stressed the unique situation confronting it:

> There is, of course, venerable authority that, wherever a contract not already fully performed is con-

> tinued in spite of a known breach, the wronged party cannot avail himself of that excuse. . . . But it is very doubtful that, even when first formulated, that rule disregarded particular circumstances justifying further performance in the specific case. . . . In this case, however, we have a special set of qualifying facts.

Id. at 551.

The above suggests that a party's reasons for continuing performance *do* matter. However, a number of factors serve to distinguish Atlas' situation from that found in *Northern Helex* and to make the *Northern Helex* rule inapplicable here. First, *Northern Helex* involved a buyer's breach, while Atlas' situation was a seller's breach. The court in *Northern Helex* referred to the U.C.C. for guidance in analyzing the *seller's* actions upon breach, and under U.C.C. §§ 2-703 and 2-704, cited by the court, the reasonableness of the seller's actions is expressly a relevant factor. By contrast, the courts in Atlas' case were reviewing a *buyer's* actions upon breach by the seller. *There are no similar U.C.C. requirements for analyzing the reasonableness of the buyer's decision to continue performance in the face of a seller's breach.* The buyer can waive the breach or cancel, and the commercial reasonableness of his decision is not a factor in evaluating the effect of his decision. U.C.C. §§ 2-601, 2-711 (1977). Hence, looking to the U.C.C. in Atlas' situation for guidance as the court did in *Northern Helex* produces the opposite conclusion: the reasonableness of the *buyer's* decision to continue or terminate performance is not a factor in evaluating the effects of that decision.

A second distinction between the *Northern Helex* case and Atlas' is that Northern Helex expressly reserved its right to terminate, while TVA did not. Under U.C.C. § 1-207 (1977), cited by the *Northern Helex* court, such an

explicit reservation of rights is effective to preserve breach rights in the face of continued performance. It is only in light of such an express reservation of rights that the court in *Northern Helex* looked to the provisions of U.C.C. §§ 2-703 and 2-704 for the seller's remedies, and the reasonableness of his decision to continue became relevant. The clear implication of *Northern Helex* is that without such an express reservation of right, the reasons for continued performance are unavailing in allowing the injured party to terminate if it has elected to continue to perform despite breach. Indeed, it is questionable whether even with such a reservation of right a party's reasons and justifications are relevant to the issue. Atlas contends they are not.

A third distinguishing factor is the *Northern Helex* court's emphasis on the "special circumstances" of the case. It notes that Northern Helex's actions were "indispensable" and the only practicable ones it could take. The court emphasized that the Government was not hurt by the company's actions nor did it change its position in reliance on them. 455 F.2d at 554. In contrast, Atlas did rely to its detriment on TVA's election to continue performance. Atlas incurred additional costs in an attempt to perform under the TVA's contracts. While Northern Helex's continued performance served only to mitigate damages, TVA's delay in terminating only served to run Atlas' damages up. Also, while Northern Helex was presented with no viable choice given the integration of helium extraction with its natural gas production, the TVA did have an alternate course of action. It could have terminated immediately and secured another contractor to finish the job. Indeed, this was the very action that TVA took two years later. Therefore, Northern Helex's actions were consistent with the legal aims of promoting economic efficiency and mitigating damages, aims that

the doctrine of waiver was intended to promote. The TVA's conduct, on the other hand, produced the opposite effect.

Finally, the suggestion in *Northern Helex* that a party's reasons for continuing are relevant to the waiver question is weakened by a subsequent decision of the same court involving one of the other companies supplying helium to the Government. *Cities Service Helex, Inc.* v. *United States*, 543 F.2d 1306 (Ct. Cl. 1976). The facts of this case are almost identical to *Northern Helex's*, except for one crucial difference: *Cities Service Helex did not expressly reserve their right to terminate when they continued supplying the Government with helium after the breach.* In fact, Cities Service Helex went to court seeking an order that the contract was still valid and in effect. The court in this case found that the company's actions in continuing to deliver helium were an election to continue performance under the contract and a waiver of its right to terminate for breach. This finding defeats the notion that, absent an express reservation of right, the exercise of commercial reasonableness and preservation of a natural resource constitute a valid basis for a holding that no waiver occurred. It is obvious after *Cities Service Helex* that the express reservation of right by Northern Helex was crucial to the outcome the court reached in that case. Indeed, the *Cities Service* court was careful to highlight the distinguishing factors of the *Northern Helex* decision:

> The position adopted in *Northern Helex Co.* v. *United States* . . . allowed a plaintiff to claim a material, contract-ending breach—despite having continued performance—only in the context of that plaintiff's explicit reservations of material breach claims, explanations in advance of the reasons for its continued performance, prompt suit before the Government took any action to terminate, the lack of prejudice to the Government, and other special factors.

543 F.2d at 1315, 1316. These factors help to explain why the court ruled as it did in *Northern Helex*. They suggest that such a ruling should be construed narrowly. The situation in *Cities Service Helex* was different:

> In the present case continued performance on both sides for a long period of time and without any explicit warning that claims of material breach would some day be asserted went far beyond the reasonable commercial judgment that we found in *Northern Helex*.

543 F.2d at 1316. In this regard, the *Cities Service Helex* case is identical to Atlas' situation with the TVA. The court in *Cities Service Helex* found that, "An explicit reservation could and should have been made of the right to consider the contract at an end." 543 F.2d at 1319. The implication of *Cities Service Helex* alongside *Northern Helex* is that without such a reservation of rights, a party's reasons for continuing to perform under the contract are irrelevant to the question of waiver of the right to terminate.

The court in *Cities Service Helex* also elaborated upon the U.C.C. provisions cited in *Northern Helex*. In doing so, it indicates that an express notice of reservation as called for in § 1-207 is important to a party wishing to continue performance without losing their right to terminate. The court stated:

> That the U.C.C. generally makes remedies cumulative and advocates flexibility in order to make the injured party whole does not mean that it sanctions the injured party's pursuit of one course (continuation of the contract) for years, and then a complete turnabout (cancellation) when the initial course proves only partially beneficial.

543 F.2d at 1317.

At first blush, the *Northern Helex* case seemed to hold that a party's reasons for continued performance were important to the question of waiver. This would, like the present case, be a radical departure from the traditional law of waiver. In light of *Cities Service Helex*, however, it is clear that if these reasons matter at all, it is only when the injured party has clearly expressed his intention of reserving his right. Atlas contends that, even in such a case, a party's *reasons* should not be considered at trial. However, since TVA elected to continue performing without any such reservation of rights, under these two Helex cases their reasons for continuing the contracts cannot be considered relevant, and a waiver should have been found.

The above cases indicate that the holding by the lower courts in this case is without precedent and clearly erroneous. It conflicts with decisions of the Court of Claims and other circuits and has opened a huge hole in what previously was considered a well-settled area of contract law. This petition should be granted to rectify the confusion created by this decision, and to settle the conflict between the circuits.

C. Importance of the Case

This case presents the Court with an opportunity to resolve a conflict in an important area of the law. A check of recorded decisions of the various boards of contract appeals reveals that in the last two years alone the boards decided 37 federal contract cases involving waiver and default. The issue also arises frequently in federal court cases. Waiver has been extensively litigated in the past and will continue to be litigated in the future. The decision in this case will affect a large number of future litigants and all those who enter into contractual agreements. It is crucial that the law in this area be unambiguous and clearly defined.

Another reason this case deserves the court's attention is the actual and potential cost involved. This is a special concern in the area of Government contracts. Government contracts involve the spending of billions of federal tax dollars. Any inconsistency or conflict in the area of Government contract rights and obligations will lead to more expense for the taxpayer. If public officials administering Government contracts are uncertain of their responsibilities, they will likely lose important contract rights through confusion or inaction. The result will be higher public cost for less performance. Similarly, contractors will be less inclined to bid and perform Government projects if they perceive that the procedures governing federal contracts are conflicting, ill-defined, or unfair. Reduced participation on federal contracts will result in less competition, and a higher overall cost to the Government. It is in the public's best interest that Government contracts, like all contracts, be administered fairly, efficiently, and consistently. The Court should review this case to ensure that the contracting procedures for default terminations are uniform and fair, and therefore as cost effective as possible to the public.

Finally, this case should be of interest to the Court because it presents an issue of judicial economy. By finding that a party's motives or reasons for continuing performance under a contract are relevant to the issue of waiver after breach, the courts below have created a new issue for litigation. Valuable court time will now have to be spent examining a party's reasons for continuing performance, and all those faced with a defense of waiver will be eager to justify their conduct. Because no precise guidelines have been established on just what is and what is not reasonable, the time consumed in litigation will be greater as parties attempt to come up with any and all reasons which may justify their actions and courts grope

for guidance in this area. In an era where judicial resources are already stretched to the limit, the Court should examine closely any decision which threatens to stretch them further.

CONCLUSION

For the foregoing reasons the writ of certiorari prayed for should issue.

Respectfully submitted,

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July 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1498

TENNESSEE VALLEY AUTHORITY,

Appellee,

v.

ATLAS MACHINE & IRON WORKS, INC.,

Appellant,

and

WILLIAMS ENTERPRISES, INC.,

Defendant.

No. 83-1566

TENNESSEE VALLEY AUTHORITY,

Appellant,

v.

ATLAS MACHINE & IRON WORKS, INC.,

Appellee,

and

WILLIAMS ENTERPRISES, INC.,

Defendant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge. (C/A 81-0194)

Argued: February 6, 1984 Decided: April 24, 1984

Before HALL, MURNAGHAN, and SPROUSE, Circuit Judges.

Robert E. Washburn (Herbert S. Sanger, Jr., General Counsel, Justin M. Schwann, Sr., Assistant General Counsel, Alvin M. Cohen on brief) for Tennessee Valley Authority; Thomas C. Wheeler (Paul C. Fuener, Pettit & Martin; Michael McGettingan, Murphy, McGettigan & West, P.C. on brief) for Atlas Machine & Iron Works, Inc.

Per Curiam:

The litigation arose from two contracts, a "steam tunnel" contract and a "drywell" contract, awarded by the Tennessee Valley Authority to Atlas Machine & Iron Works, Inc. to procure the fabrication of steel construction components for nuclear generating plants under construction in Tennessee. The two contracts were awarded to Atlas in 1978. The steam tunnel contract, priced at $3,592,200, called for the fabrication and delivery of six steam tunnel embedments, one for each of six nuclear reactors under construction.[1] The first delivery was scheduled for March 1, 1979, the last September 1, 1980. The drywell contract, priced at $12,100,000, called for fabrication and delivery of 78 drywell embedments, one set of 13 for each of the six nuclear reactor units.[2] Deliveries were initially scheduled to begin on April 17, 1979 and end on March 17, 1981.

Numerous problems arose during construction. The fabrication sequence recommended by TVA and incorporated into the contract, was new and previously untested; after initial failures in construction the parties revised the specifications. The district court found that the initial specifications rendered the steam tunnel unbuildable.

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[1] The embedments provide reinforcement for main steam lines, and both protect the steel reactor containment and provide a shield from radiation in the event of a major accident.

[2] The embedments provide reinforcement and stability to the drywell wall, and are also safety related, providing radiation protection.

At the same time, Atlas repeatedly failed to meet delivery schedules, and performed numerous aspects of the contract, particularly the welding, in an extremely poor manner. There were frequent discussions between TVA and Atlas regarding both the quality of the workmanship and the late deliveries. Atlas repeatedly assured TVA that the deliveries would be made timely, and that the quality of its work would improve. By June, 1980, work apparently had ceased on several frames supposedly under construction. By December, 1980, TVA inspectors reported that Atlas had in effect abandoned the contracts. On February 13, 1981, TVA terminated the contract, a step the district court found justified by

> Atlas' lack of due diligence—sub-par workmanship—improper implementation of its QA [Quality Assurance] program—late deliveries—together with the progressive worsening of these deficiencies by February of 1981. . . .

On May 1, 1981, TVA awarded a cost-reimbursement contract for Chicago Bridge & Iron Company (CBI) to complete a portion of the work called for under the Atlas contracts. TVA terminated the CBI contract on March 4, 1982 as a result of its decision to defer construction of its nuclear plants. CBI had delivered only one frame.

TVA initially filed an equitable action to recover possession of all material related to the contracts, which Atlas had refused to release after termination of its right to proceed on the contract. On March 2, 1981, the district court upheld TVA's claim, and accordingly issued an injunction. Both sides then filed damage claims, which the district court adjudicated in a bifurcated bench trial. In a memorandum and order, dated January 22, 1982, the court resolved the liability issues. In a subsequent memorandum and order, dated April 14, 1983, the court resolved the damage issues. This appeal and cross-appeal followed.

I.

Each party raises three issues regarding the district court's memorandum and order resolving the liability issues. We briefly consider, and reject, each of the contentions.

TVA first contends that the district court was clearly erroneous in finding that the steam tunnel was unbuildable. TVA's experts testified that the unanticipated distortions which arose could have been controlled by employing heavy "strongbacks" during the post-weld treatment process. TVA argues further that, in any event, responsibility for the fabrications should have rested on Atlas' shoulders, since Atlas was the builder. The latter argument ignores the fact that TVA presented bidders with a "take it or leave it" proposal and insisted on construction according to its own specification. As for the proposed corrective measures, Atlas' experts testified that the solution would not work. More importantly, TVA's admission that changes, additions and weld reinforcements were needed, substantiate the district court's finding that the specifications had to be materially modified, and that the steam tunnel, in its original design was unbuildable.

TVA next claims that, even if the steam tunnel were unbuildable, Atlas knowingly assumed the risk that the steam tunnel could be built as designed. TVA bases its contention on the fact that Atlas' president had questioned, prior to the award of the contract, whether the tunnel was buildable. While prior to the award Atlas did question the buildability, it did so because it was recommending a slightly different fabrication sequence, one which its President had seen in operation in England. Atlas, however, did not possess any actual knowledge of specific defects, but instead was proposing an alternative to a new and untested method. Particularly since TVA refused to listen to proposals for deviations or alterations and insisted that Atlas follow TVA's specifications, the facts do not support a conclusion that Atlas assumed the risk.

TVA's final contention is that the "Claims and Protests" clause in the contract bars consideration of Atlas' unbuildability claim. That clause required the filing, within thirty calendar days after the arising of the cause for such a claim, of a formal written protest of itemized statement of the details and damages, or the claim was considered to be waived. Even though Atlas admits that it filed no formal claim prior to

termination of the contract, we decline to adopt such a stringent reading of the clause. The parties were involved in an exceedingly complex set of contracts which gave rise to a plethora of problems. With so much money and effort at stake, the parties resorted to frequent discussions designed to salvage the rapidly deteriorating situation. To adopt TVA's argument would be to punish Atlas for seeking to resolve the difficulties by negotiation, rather than by the interjection of a formal, written claim. Furthermore, since the negotiations provided TVA with all the information it would have received from the written claim, we cannot ascertain any prejudice to TVA from Atlas' failure to file the claim. Accordingly, we affirm on that claim as well.

Atlas' first claim is that TVA waived its claim of default by waiting two years after Atlas first failed to deliver before terminating the contract. Atlas contends that, since it repeatedly informed TVA of its difficulties, TVA should have terminated sooner, if it was going to terminate at all. As with TVA's final claim above, we refuse to conclude that the basic principles of contract law are so inflexible so as to require so stringent a result despite the complexity of the contracts at issue. The district court found that, had "TVA immediately terminated Atlas' contracts upon its failure to timely deliver the first frames, both would have been the loser: Atlas, financial—TVA, timewise." For the reasons discussed above, the finding was not clearly erroneous, and leads to the conclusion that TVA's reasonable efforts to salvage the situation cannot be viewed as a waiver of its rights to claim default.

Atlas next presents a two-fold argument that it was not in default. First, it argues that it was entitled to a number of months of excusable delay, and that the delay period had not ended by the time TVA terminated, meaning that Atlas was not yet in default. Second, it contends that the finding of unbuildability meant that Atlas could not have been in default, since performance was impossible. The second claim fails in light of the realization that the tunnel became buildable with the alteration of the specifications. In any event, the claim,

taken to its logical extreme, would require that all of Atlas' poor performance be excused by the defective specifications, and Atlas be treated as if it had performed perfectly. As for the first contention, at least by March, 1980, performance on both contracts was possible. Given the status of Atlas' operation, its shifting of manpower away from the TVA contracts, and the impression given to TVA's observers that Atlas had virtually abandoned the contracts, it was quite reasonable for the district judge to conclude that Atlas had in fact defaulted.

Finally, Atlas claims that it deserved, for numerous reasons, a 55-week extension for performance of the drywell contract. The district court found that a June 30, 1980 settlement agreement covered claims of that nature, and stated that Atlas would not "be permitted to relitigate these settled claims." The finding was not clearly erroneous. Atlas conceded at trial that no change in the inspection standards occurred after the settlement. Therefore, since the purpose of the extension was to compensate for alleged changes in the drywell contract, Atlas could not have justified the additional 21 weeks. Furthermore, the 40-week extension period actually granted was designed to compensate Atlas for additional workers necessary to complete the embedments. Yet Atlas employed 18 *fewer* workers than anticipated at the settlement, meaning that the 40 weeks more than fully compensated Atlas.

For the above reasons, we affirm the district court's findings of fact and conclusions of law on the liability issues.

II.

The parties raise eight issues with respect to the district court's disposition of the claims for damages. The parties agree, however, that the district court erred in allowing Atlas to recover, as damages for unbuildability of the steam tunnel, its total costs from the project, rather than the costs actually caused by the defective specifications. Both also concede that the court erroneously allowed Atlas a double recovery for the

unbilled work in progress. On at least four other issues[3] we are convinced that a second consideration at the district court level would be advisable.

Rather than tying the hands of the district court on remand, we have chosen to vacate completely the findings and conclusions on the damage issues contained in the memorandum and order dated April 14, 1983. On remand, the parties may see fit to stipulate to those findings in the original disposition that they can agree were correct. The district court may conduct whatever additional hearings, or take any additional evidence, it deems necessary or useful to the disposition of the admittedly complex issues.

III.

For the foregoing reasons, the district court's opinions are

AFFIRMED IN PART, AND
VACATED AND REMANDED IN PART.

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[3] TVA's completion costs, the costs of the "blockouts" for the steam tunnel contract, TVA's removal and transportation costs of the property held by Atlas, and the alleged over-payments for field splicing.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1498

TENNESSEE VALLEY AUTHORITY,
Appellee,

v.

ATLAS MACHINE & IRON WORKS, INC.,
Appellant,

and

WILLIAMS ENTERPRISES, INC.,
Defendant.

No. 83-1566

TENNESSEE VALLEY AUTHORITY,
Appellant,

v.

ATLAS MACHINE & IRON WORKS, INC.,
Appellee,

and

WILLIAMS ENTERPRISES, INC.,
Defendant.

FILED
JUNE 1, 1984
U.S. COURT OF APPEALS
FOURTH CIRCUIT

ORDER

Upon consideration of the appellant/cross-appellee's petition for rehearing and suggestion for rehearing en banc, and no

judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Murnaghan for a panel consisting of Judge Hall, Judge Murnaghan, and Judge Sprouse.

For the Court,

WILLIAM K. SLATE, II
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION NO. 81-0194-A

TENNESSEE VALLEY AUTHORITY,
Plaintiff,

v.

ATLAS MACHINE & IRON WORKS, INC.,
Defendants.

FILED
JAN 22, 1982
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

MEMORANDUM OPINION AND ORDER

This phase of this case was heard on liability only—the amount of damages, if any, to be heard and determined later.

The Tennessee Valley Authority (TVA) awarded two contracts to Atlas in 1978 to procure the fabrication of steel constructural components for TVA nuclear generating plants under construction in Tennessee.

TVA terminated Atlas' right to proceed under these contracts in February 1981, because:

1. Atlas had not prosecuted the work with such diligence as to insure satisfactory compliance under the requirements of the contracts.
2. Atlas had consistently missed delivery dates under both contracts.
3. Atlas' work had not met contract specifications.

This case was originally filed as an equitable action to recover possession of all material identified with the contracts, including work in progress—and all contractually required quality assurance documentation—which Atlas had refused to release after the termination of its right to proceed.

This Court on March 2, 1981 upheld TVA's claim, and the work in progress and most of the documents have been turned over to TVA.

Following the issuance of the injunction, damage claims for alleged breach of contract were raised by Atlas and by TVA, pursuant to Sections 6 and 16 of the Contract Disputes Act of 1978.

The first contract (called the "steam tunnel contract"), executed February 27, 1978, required Atlas to fabricate and deliver to TVA six shield building steam tunnel embedments.

The second contract, dated August 17, 1978, required Atlas to fabricate and deliver to TVA 78 drywell frame embedments.

On February 28, 1979, TVA issued Change Order No. 2 accelerating the delivery schedule by 30 days for Phipps Bend Unit #1 frames, and by 19 days for Phipps Bend Unit #2.

On June 2, 1979, TVA and Atlas agreed to change the contract to add two additional frames (12 and 13) for each nuclear unit (Change Order No. 4).

Section 1.7.1, of the General Specifications, states in pertinent part:

> The Seller shall be solely and entirely responsible for the furnishing of materials, fabrication, fit up, inspection and testing, shop cleaning and painting and delivering the steam tunnel [or framed] embedment[s] as specified herein and in compliance with this specification and reference documents.

Atlas contends that TVA waived its right to terminate the steam tunnel and drywell contracts by failing to take action to terminate within a reasonable time after the default occurred,

and by encouraging Atlas to continue performance for approximately two years after TVA knew that Atlas was in default.

Atlas further contends that it was not in default as of the date of TVA's notice of termination because it was then entitled to a 55-week time extension on the drywell contract, and a 100-week time extension on the steam tunnel contract—as a result of excusable delays encountered during contract performance.

This Court has jurisdiction to review, de novo, the February 26, 1981 final decision of the TVA contracting officer pursuant to the Contract Disputes Act of 1978, 41 U.S.C. 609(a), (Supp. III 1979).

The contracting officer's final decision is vacated upon appeal to this Court, and carries no presumption of validity.

When the Government decides to exercise its right to terminate under its contracts, it must manifest its intent to so do within a reasonable time after default occurs. *See*, DeVito v. United States, 413 F.2d 1147 (Ct. Cl. 1969).

What constitutes a reasonable time depends on the facts and circumstances of each case. As was said in the *Olson Plumbing & Heating* case, (602 F.2d 950 (Ct. Cl. 1979)):

> Whether a party to a contract loses its right to terminate for default by not ending the contract on the date performance is due but not tendered, depends upon a balancing of the advantages to the injured side of continuing performance (with or without reservation of rights) against the disadvantages to the defaultor.

The Government has the burden of establishing that the contractor failed to meet the contract delivery schedule, or that it failed to perform any other requirement to the contract. If this burden is met, the burden shifts to the contractor to show that its failure to perform was excusable. *See*, Mayer Labs, Inc., 74-2 BCA 10804, and Atlantic Terminal Co, 71-1 BCA 10804.

The Court's findings follow:

The delivery schedule under the contracts in this case called for deliveries to begin in early 1979—Atlas admits it missed the

first and second delivery dates, and that it did not thereafter meet any of the delivery dates under either contract.

Atlas did not make any deliveries under the steam tunnel contract—and delivered only nine of the 78 frames called for in the drywell contract—none on time—some were as much as a year or more late.

Atlas repeatedly assured TVA that its deliveries would be made timely—and gave TVA new delivery dates for both the drywell and steam tunnel embedments—none of which were met.

No frames were delivered to Atlas after December 15, 1980.

Atlas encountered welding problems from the beginning—none of the delivered frames met contract welding specifications—all had to be reworked.

TVA's inspectors complained to Atlas about poor workmanship on many occasions—such as welds, which contained cracking and undercoating, overlap and insufficient throat. For more examples, see the numerous TVA inspectors' reports that were introduced into evidence—also, see Atlas's internal daily inspection reports documenting the enormous number of repairs and poor workmanship.

Atlas was required, under the contracts, to establish, document and execute a system for the control of quality during all aspects of the work. The QA program had to conform to the standards of the Nuclear Regulatory Commission.

Atlas submitted its quality assurance manual to TVA—but failed to implement its QA program in accordance with its manual *in re* the maintenance of travelers and other QA documents—welding and repair procedures were not available to Atlas welders—quality control inspectors did not operate independently of Atlas' production department; and information on the travelers did not consistently match the welder's stamp on the embedments. *See* the TVA QA audit reports, which were admitted in evidence, for more detail.

By mid-1980, Atlas' QA system had worsened—and they hired NATCO as a QA consultant to upgrade its QA program and to assist in the indoctrination of QA personnel.

The consultant confirmed the many deficiencies in Atlas' QA program (*see* their report and TVA's Exhibit No. 326).

After NATCO wrote a new quality assurance manual for Atlas, TVA's audit of Atlas' implementation of that manual reported no new findings. However, many of the previous findings had not been remedied and TVA's QA branch recommended in February of 1981 that a "stop work" order be issued until this problem could be corrected.

Atlas' inability to timely perform its contracts was caused both by its need for constant repair and re-work and by the lack of qualified manpower. They never had sufficient welders—by June of 1980, no apparent work was being done on several frames—one frame had been sitting at the plant since last year.

By December of 1980, TVA inspectors reported that Atlas had in effect abandoned the TVA contracts—because Atlas' Maryland bridge contract had priority—and that no work would be done on the TVA contract until that job was completed. For more detail, see TVA inspectors' reports of January 7 and February 7, 1981.

Atlas' performance on the steam tunnel contract was not any better. Progress was slow from the start, due, in part, to the small number of people working on the unit—only three in December of 1978 with no more by May of 1979—no work was in progress on Unit No. 1 in August of 1979—Atlas was expending most of its efforts on another TVA contract.

By October 1979, a major distortion problem was discovered on Unit No. 1—by October of 1980, no work had been done on that Unit within the last 60 days—the lower section was still in place on the pad. *See* the numerous TVA inspectors' reports that were introduced into evidence for more detail.

Atlas' lack of due diligence—sub-par workmanship—improper implementation of its QA program—late deliveries—together with the progressive worsening of these deficiencies by February of 1981—justified TVA's terminating Atlas' right to proceed on February 13, 1981, and

THIS COURT SO DECREES.

Atlas' claim that TVA waived its right to terminate by not so doing as soon as it knew that Atlas was in default lacks both legal and factual support.

In order to establish a waiver, Atlas must point to some clear and decisive conduct on the part of someone in authority indicating that TVA will not insist on adherence to the original schedule.

This Atlas has failed to do.

The evidence in this case clearly shows that Atlas was having labor, production and QA problems, from the beginning. Both Atlas and TVA knew before the first scheduled delivery date that Atlas would not be able to meet the scheduled delivery dates—TVA also knew that a change in contractors would be costly to Atlas and would further delay the construction of its nuclear plants.

Had TVA immediately terminated Atlas' contracts upon its failure to timely deliver the first frames, both would have been the loser: Atlas, financial—TVA, timewise. Instead of so doing, TVA elected to work with Atlas and tried to help it solve its welding and other problems.

Several of their employees, including their contract engineer, worked with Atlas in their facilities on a full-time basis from May of 1980 on; their mission was to act as engineering expediters and to assist Atlas in the resolution of its performance problems.

TVA also assisted Atlas in revising and implementing its QA manual.

During this time frame, Atlas was repeatedly promising TVA it would improve its untimely performance—Atlas was also requesting extended delivery dates as late as January of 1981.

During this forbearance period, TVA continuously advised Atlas by letter that delays in delivery were unacceptable and the costs incurred would be backcharged.

Further, the delays and remedies clauses of the contracts provided: to allow the contractor to perform after the specified time for completion shall not constitute an extension of time or a waiver of any of TVA's rights or remedies.

When TVA met its burden of establishing that Atlas failed to meet its delivery schedule and perform the other requirements of its contract—as it has done here—the burden shifted to Atlas to show that its failure to perform was excusable.

Atlas' claim to a 55-week time extension on the drywell contract, for excusable delay encountered during contract performance, included most, if not all, of the claims filed by Atlas on May 30, 1980, which were compromised and settled on June 30, 1980. Atlas was then granted 40 additional weeks of performance time.

That settlement included all of Atlas' changes to the drywell contract, and its claims for over-inspection and rejection of acceptable welds. Atlas will not be permitted to relitigate these settled claims.

Although the June 30 settlement left open Atlas' claim for impacts on non-TVA projects and its claim for additional time (21 weeks—Atlas' Exhibit No. 167), Atlas has failed to prove, during this hearing, that it was entitled to any additional performance time to its drywell contract.

Further, based on Atlas' performance up to the date of termination (February 13, 1981), had Atlas been granted the claimed 21 weeks, it is very doubtful, to say the least, that it would have timely delivered any more frames. Nevertheless,

Atlas will be given the opportunity to so prove during the coming damage hearing, if it be so advised.

Atlas' claim for a 100-week performance time extension to the steam tunnel contract had little, if any, probative value in determining whether TVA was justified in terminating that contract on February 13, 1980 because Atlas had determined by late 1979 that the steam tunnel could not be built—and its President and its two experts both claimed, during this hearing, that the steam tunnel embedments could not be built within the allowable tolerances by using the fabrication procedures required by the specifications.

The question here is not whether Atlas is entitled to additional time to build the steam tunnel embedments—they admit they cannot build them—it is whether Atlas is entitled to the extra cost incurred in attempting to build the steam tunnel embedments in accordance with the specifications.

Considerable testimony was had during this hearing on the issue of whether the steam tunnel contract specifications were defective.

No one has ever built a steam tunnel embedment in accordance with these specifications.

TVA's experts testified that they could have been fabricated to the tolerances required by employing heavy strongbacks to control distortion during the post-weld heat treatment process. Atlas' experts said that would not solve the problem—one suggested the problem might be alleviated by making the plates larger and by presetting.

The specifications did not call for the use of strongbacks. None of TVA's engineers suggested their use by Atlas, even after misalignment problems were encountered.

TVA admits that Cadwell Sleeve changes, additions and weld reinforcements, were required and that it had authorized the removal and replacement of stiffeners and skin plates. They questioned only the cost impact claimed by Atlas.

TVA further admitted that had Atlas timely submitted its monetary claims for defective design, it might have been able to assist Atlas in resequencing its work and altering its fabrication processes, so that it could be performed within the tolerances allowable under the specifications—and that, if necessary, it would have explored with General Electric and its sub-contractor, Braum, the possibility of revising the specifications.

Instead of so doing, TVA terminated Atlas' right to proceed under the steam tunnel contract and has claimed and recovered possession of all material identified with the contracts, including work in progress.

It is clear from this evidence and TVA's admissions—that the specifications had to be materially modified if the dimensional tolerances required by the contract were achievable, and IT IS SO DECREED.

If the required modifications caused Atlas to incur increased costs, it is entitled to recover those costs from the Government—*see* Ordnance Research, Inc., 609 F.2d 462 (Ct. Cl. 1979).

Having breached the drywell contract, Atlas is liable for TVA's reasonable costs of completion.

The costs of completion shall include the reasonable cost of necessary documentations and rework.

TVA is not entitled to recover the costs incurred in removing and transporting the work in progress from Atlas' facility to Tennessee unless they have heretofore paid these transportation costs to Atlas—and then only for the amount so paid.

TVA is not entitled to any escalation in its construction costs caused by Atlas' delay in the delivery of the drywell frames, unless so provided for in the drywell contract.

TVA is not entitled to recover its costs for "blockouts" to allow other contractors to continue their work in the absence of embedments—TVA could have terminated Atlas' contract

much sooner than it did. Instead, it permitted Atlas to continue for approximately two years after default in delivery.

Atlas is entitled, as a credit against the completion costs—all amounts, if any, TVA owed on the drywell contract as of February 13, 1980, for retainage, unpaid invoices, unbilled work in progress, and unbilled costs of performing authorized "extras."

Interest, if any shall be computed in accordance with the Contract Disputes Act.

Although this Court has determined that TVA was justified in terminating its steam tunnel contract with Atlas, it does not necessarily follow that Atlas is responsible for the costs of completion.

This Court has found, from the evidence presented, that the specifications had to be materially modified if the required tolerances were to be achieved.

TVA approved several material changes in the specifications during Atlas' attempt to build these embedments to the required dimensional tolerances—and now recognizes the possibility of having to further revise them.

Instead of terminating the steam tunnel contract much sooner than they did, TVA elected to work with Atlas in solving the known construction problems.

They have claimed and recovered, after termination, all of the materials, including the work in progress, that Atlas had produced under the contract as of that date—some of which they had paid for—some of which they had not—according to Atlas.

Under the circumstances here found, the Court is of the opinion that TVA is not entitled to recover the cost of completing the steam tunnel contract from Atlas—instead, equity dictates that TVA should be required to pay Atlas the actual costs that it has paid and/or incurred in its attempt to build the steam tunnel embedments to the required tolerances, and

IT IS SO ORDERED.

Atlas is not entitled to any of its other claimed losses resulting from TVA's termination of these contracts.

If the parties cannot compromise and/or settle their respective damage claims within the next sixty (60) days—each shall file an itemized copy of their claim, together with supporting documents, with the Clerk of this Court, and with opposing counsel, on or before April 1, next.

Opposing counsel shall admit and/or deny each of the items claimed. If denied, opposing counsel must state the correct amount. If they deny the claim in its entirety, they must state the grounds relied on, together with supporting documents. Copies thereof must be filed with the Clerk and opposing counsel within thirty (30) days from the date of receipt of opposing counsel's itemized claims.

Disputed items, if any, will then be set down for hearing and determination by this Court, and/or by a jury, if one has been formally requested, by either party.

The Clerk will send a copy of this Memorandum Opinion and Order to all counsel of record.

January 22, 1982

/s/Oren R. Lewis

Senior United States District Judge